

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

TEXAS DENTAL ASSOCIATION

and

NATHAN CLARK, an Individual

Cases 16-CA-25349
16-CA-25383
16-CA-25840

and

BARBARA JEAN LOCKERMAN, an Individual

and

PATRICIA ST. GERMAIN, an Individual

Roberto Perez, Esq., for the General Counsel.
Lin Hughes, Brian T. Thompson, and William H.
Bingham, Esqs., for the Respondent.

DECISION

Statement of the Case

GEORGE CARSON II, Administrative Law Judge. This case was tried in Austin, Texas, on February 11 and 12, 2008, pursuant to an amended consolidated complaint that issued on February 1, 2008.¹ The complaint alleges that the Respondent discharged employee Nathan Clark in violation of Section 8(a)(1) of the National Labor Relations Act because he engaged in protected concerted activity, discharged supervisor Barbara Jean Lockerman in violation of Section 8(a)(1) of the Act because she refused to commit unfair labor practices, and interfered with, restrained, and coerced employee Patricia St. Germain with regard to her Section 7 rights in violation of Section 8(a)(1) Act. The Respondent's answer denies any violation of the Act. I find that the discharges of Clark and Lockerman violated the Act as alleged in the complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

¹ All dates are in 2006 unless otherwise indicated. The charge in Case No. 16-CA-25349 was filed on December 12, the charge in Case No. 16-CA-25383 was filed on January 8, 2007, and the charge in Case No. 16-CA-25840 was filed on October 4, 2007.

Findings of Fact

I. Jurisdiction

5 Texas Dental Association, the Association, a Texas corporation, is a professional
association that advocates on behalf of the dental profession from its offices in Austin, Texas. It
annually derives gross revenues in excess of \$1,000,000 and purchases and receives materials
and services valued in excess of \$50,000 directly from points located outside the State of
Texas. The Respondent admits, and I find and conclude, that it is an employer engaged in
10 commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. Alleged Unfair Labor Practices

A. *The Discharges*

1. Overview

15 The Association has a membership of over 7,700 dentists in the State of Texas. The
Executive Director of the Association is Mary Kay Linn, who reports to the Board of Directors.
20 The Board of Directors consists of 26 members elected in May of each year at the Association's
yearly convention, referred to as the Annual Session, by 119 voting delegates who represent
various dental councils and committees throughout the state. In May 2006, the President was
Dr. Richard Black. From May 2006 until May 2007, the president was Dr. Tommy Harrison. The
current president, who assumed office in May 2007, is Dr. David May.

25 The Association, at its Austin, Texas, office, employs approximately 30 individuals in
various departments including membership, finance, ethics, and communications. The
supervisors of the various departments are designated as Directors, not to be confused with the
Board of Directors. The Association also has a Department of Financial Services, a for-profit
30 entity that endorses products. Director Barbara Lockerman was supervisor of that department
until her discharge.

Employees Nathan Clark and Patricia St. Germain worked in the Finance Department
and were supervised by Director of Finance Laura Haufler.

35 The Annual Session in 2006 was held in San Antonio, Texas. Dr. Jay Baxley, a delegate
but not a member of the Board of Directors, introduced a resolution calling for an investigation
of the management of the staff of the Association by an outside source selected by the auditor
of the Association. He also attempted to present a petition signed with the aliases of 11
40 employees but was not permitted to do so. Within a day or two after the convention, employee
Nathan Clark, who had drafted the petition, anonymously sent it to the Board of Directors. On
May 17, Executive Director Linn required that anyone with knowledge of these "anonymous
communications" meet with her. None of the employees involved did so.

45 On August 17, following an investigation of computer hard drives, Clark and Lockerman
were fired for various stated reasons including failure to comply with Linn's May 17 directive.

2. Facts

Although employees of the Association had various complaints, prior to 2006 those
complaints had not resulted in any protected concerted activity. On February 28, Katherine
Simms, Director of Ethics, a supervisor as defined in the Act, was discharged by Executive

Director Linn. Simms' discharge followed her breaking off a relationship with a coworker who was also a supervisor. Simms took issue with the discharge decision, hired an attorney, and spoke with Dr. Jay Baxley, who at that time was chairman of the Ethics and Judicial Committee of the Association and had regularly dealt with Director of Ethics Simms. Dr. Baxley raised his concerns that Simms had been unfairly treated with the members of the Ethics and Judicial Committee. The committee agreed. Dr. Baxley sought to raise the matter with the Board of Directors but was informed that "it was outside your committee's scope of duty." Dr. Baxley concluded that the Board of Directors and Executive Director "were going to sweep this under the rug the best they could." In an effort "to bring up the issue," Dr. Baxley, on March 21, sent an e-mail to various members of the Association as well as to staff employees of the Association to which he attached an arrest record pertaining to the coworker with whom Simms had broken off the relationship. The e-mail, as confirmed by the arrest record that was attached, stated that the coworker had been "caught on TDA [Texas Dental Association] premises using/possession [sic] of marijuana and other drug paraphernalia." The e-mail also stated that the coworker had recently "allegedly inappropriately touched another TDA employee." The e-mail concludes by asking whether the Association "want[ed] people like this represent us."

On March 21, Dr. Herbert Wade, Chairman the Internal Affairs Committee of the Association, wrote Dr. Baxley directing that he cease any involvement in "these pending legal issues." Dr. Baxley ignored the directive.

Among the responses to his e-mail, Dr. Baxley received anonymous communications from staff members noting that this "was typical," that when issues came up that Executive Director Linn did not like, she would "squelch" them either by making the life of the complaining employees "difficult or by terminating them." The e-mails that Dr. Baxley received made him aware of various complaints of staff members including complaints relating to the facility, alleged financial improprieties, and unfair treatment.

Following the receipt of Dr. Baxley's March 21 e-mail, staff employees began speaking with each other regarding various issues. There were two meetings at a local restaurant. The first was after work in late March. It was attended by about seven employees as well as two unidentified "directors," i.e. supervisors. Various concerns were discussed in addition to the termination of Director of Ethics Simms. The concerns included the December 2005 termination of employee Victor Sanchez, a Hispanic maintenance employee. Employee Clark spoke about what he considered to be financial improprieties and problems relating to the building at which the employees worked including the pooling of water in the parking lot, suspected mold on a wall, and a nonfunctioning light in the south stairwell, problems that had been raised but which in March 2006 still existed. Clark recalled that one employee complained that she had been requested to take certain hours off of her time card, and another complained of alleged sexual harassment. Employee Patricia St. Germain stated her opinion that the employees needed to "stand as one." Although she anticipated that this would involve meeting with Executive Director Linn, other employees were "frightened to go to her or didn't trust going to her." The idea of a petition was discussed. The employees were uncertain whether they could petition the Board of Directors, and it was decided that a petition would be submitted to the House of Delegates.

Following that meeting, Clark went home and drafted a petition on his personal computer. Thereafter, the employees again met at the local restaurant. On this occasion, about five or six employees and one director, Barbara Lockerman, were present. Lockerman arrived after the meeting began and left before it ended. The employees were concerned about retaliation, and, in view of that concern, the employees used aliases when signifying their support of the petition. St. Germain and employee Teresa Kim gave up their anonymity at the hearing herein and identified their particular alias, thus confirming that the petition was

supported by more than one employee. Clark testified that all 11 aliases that appear on the petition are employees of the Association, and I credit that testimony.

Prior to going to the meeting, Lockerman called Dr. David May, with whom she worked on a regular basis because he was, at that time, President of TDA Financial Services. Dr. May is currently President of the Association. Lockerman informed May that she had no idea what was being discussed and questioned "whether a meeting could take place," noting that she wanted some guidance. She recalls that Dr. May told her, "Barbara, they'll be fired." Although Dr. May did not recall saying "all employees," he did recall that he cautioned Lockerman about becoming involved, stating that, if she did so, "there's a chance you could lose your job." I credit Lockerman's testimony that Dr. May spontaneously stated, "Barbara, they'll be fired," upon learning of the employee activity. Although Lockerman attended a portion of the meeting, she heeded the advice of Dr. May and did not sign the petition. About a week after the meeting, Director of Finance Laura Haufler, who is the direct supervisor of both Clark and St. Germain, spoke with Lockerman and asked her to talk Clark "out of these activities, because ... he would be fired." Lockerman explained that she could not do so, that "Nathan is his own person."

Following the second meeting at the restaurant, Clark drafted a resolution that called for an independent investigation of the management of the staff of the Association. He sent the draft of the resolution anonymously to Dr. Baxley, and stated that he would be sending a petition in support of the resolution which Clark understood Dr. Baxley would present at the Annual Session. Shortly after receiving that letter, Dr. Baxley received the petition bearing the 11 aliases.

The petition, titled A Petition from Concerned Staff of the Texas Dental Association, in pertinent part, states:

In order to better serve the membership of an organization for which we have gained great respect and affection ... [we] are humbly requesting your assistance. In recent years, we have watched and been saddened as poor management, a dwindling morale, and a declining work ethic ... has pervaded your central office in Austin. Many of us have tried on numerous attempts to correct these problems by bringing them to the attention of current management through use of the "proper channels." Unfortunately, our concerns have gone unanswered and we are now compelled to ask for your help. ... We seek not to point a finger at any individual member of the staff, but to voice our concern to an impartial outside source, free from any retaliation or repercussion. You will be surprised when you begin to hear specific examples of poor management, negligence, and unfair treatment that have occurred. ... We sign anonymously for fear of retaliation and not because we do not truly believe in this cause. ... Please help us make your Texas Dental Association what it needs to be—a better, fairer, and more ethical place to work,—so that it can work better for you.

Dr. Baxley was a delegate at the Annual Session. Near the end of the first day, when the floor was opened for new business, he asked to read the employee petition. The speaker requested to see the petition, and Dr. Baxley complied. Dr. Baxley was told that he could not read the petition. He was allowed to read his resolution calling for an independent investigation, but, as soon as he finished reading it, he was informed that it was "totally outside the scope of this meeting." He called the question, and the resolution was defeated.

Clark sent the petition, anonymously, to the Board of Directors. Within a few days, Dr. Baxley learned from staff members that what was described as a "witch hunt" had begun in an effort "to find out exactly who these people were, how they were in communication with me."

The witch hunt to which Dr. Baxley referred began on Wednesday, May 17, when Executive Director Linn held a staff meeting in which she directed anyone who had participated in any way in "these anonymous communications" to contact her as a condition of their employment. Linn had learned that the petition, which Dr. Baxley had not been allowed to read, had been sent anonymously to the Board of Directors. As the employees were leaving the meeting, employee St. Germain noted that several employees "were making zipper motions across their mouth." On the same date, Linn sent an e-mail to the staff stating:

Just to reiterate what I said at today's staff meeting regarding the anonymous communications--

By now I am sure that each of you knows what took place on the House Floor on Thursday with Dr. Baxley and the reaction of the House of Delegates regarding the anonymous communication. We have now had another anonymous communication that was sent to the Board of Directors.

In order to allow one more opportunity to discuss any concerns within appropriate channels, I expect that anyone who has participated in anyway [sic] in these anonymous communications to call or e-mail me by the end of this week to schedule an appointment with me on an individual basis. I will be traveling over the next few days so call me ... or e-mail ... me

This is a requirement of your employment & this is a matter we intend to resolve. [Emphasis in the original.]

On May 18, employee St. Germain, identifying herself as "[a] concerned TDA staff member," wrote the then current president of the Association, Dr. Harrison, and the president elect, Dr. May, expressing dismay that the Executive Director had directed that all who had "participated in the petition" make an appointment with her as a "condition of our employment." The letter points out that the termination of Simms "was only one among many issues." In that regard, St. Germain noted that the "best receptionist" that the Association ever had resigned after "being given way too many duties." The receptionist had protested and employees "felt that a case was being built against her that was not based in truth." Although the request in the petition for an independent investigation had not been granted, St. Germain's letter states that the staff looked forward to "a day when we need not be in fear for our jobs" and requests appointment of a personnel committee that "can respond to directors and staff impartially."

Executive Director Linn, after consulting with the Board of Directors, hired Andrew Rosen, a forensic scientist who specializes in computer storage devices and file systems. On May 19, legal counsel to the Board of Directors forwarded the petition to Rosen. Linn identified five "suspects" whose computer hard drives were examined. The five were employees Clark and St. Germain and three directors, including Lockerman. The examination revealed a "fragment of the text" of the petition on Clark's computer. Clark, at the hearing herein, acknowledged that, although he drafted the petition on his personal computer at home, he may have opened it at the office.

On June 27, Director of TDA Financial Services Lockerman heard rumors that Director of Public Affairs Jenny Young was saying that she, Lockerman, was the "ringleader" regarding what had happened at the Annual Session in San Antonio. Lockerman confronted her and denied any involvement. Young denied to Lockerman that she had made any statements

relating to Lockerman's alleged involvement. On June 28, Young sent a memorandum to Executive Director Linn reporting the conversation and stating that Lockerman had said that she had tried to advise the employees to "take a different route." Young did not testify.

5 In July, Director of Annual Session and Meeting Services Sandy Blum reported to Linn that Lockerman, referring to Young's description of her as the "ringleader," had denied any involvement but acknowledged trying "to discourage some of the other staff not to continue this activity." Although directed to reduce her statement to writing, Blum did not do so until August 15. Blum did not testify.

10 Linn mentioned Lockerman's conversations with Young and Blum to Lockerman at the time of her termination. Lockerman protested that she did not think it was fair, that they were not present, thus she was in no position to defend herself regarding what they had reported that she had said. Linn cut Lockerman off stating, "This is no time for discussion." As already noted, 15 Director of Finance Haufler had asked Lockerman to talk Clark "out of these activities, because ... he would be fired," but Lockerman pointed out that Clark "was his own person." There is no probative evidence that Lockerman had any involvement in the activities of the employees following her attendance at the second meeting at the restaurant. Linn admitted on cross examination that she believed that Haufler "knows more than I think she knows." Nevertheless, 20 Linn took no action against Haufler, who did not testify, for withholding information. Although Haufler is a director, i.e. supervisor, Linn's inaction with regard to Haufler confirms the perception of employees stated in the petition relating to unfairness.

Linn received the report of forensic scientist Rosen in early August. Only Clark was 25 implicated as a result of the search of the computer hard drives. On August 17, Linn discharged Clark and Lockerman. On the same day she informed St. Germain that Clark had been discharged and spoke with her regarding a conversation that St. Germain and Clark had with auditor Patti Schmidt in late April or May following a settlement that the Association made with Simms on April 19.

30 On August 17, Executive Director Linn called Clark to her office. Director Haufler, his supervisor, was present. Linn read from a prepared document and informed Clark that he was being discharged for "participating in this anonymous e-mail scheme and ignoring my request" of May 17 to meet with her on an individual basis. She stated that Clark has also inappropriately 35 used "the Association's computer and e-mail system" in violation of the Electronic Communications Policy and had acted "outside the scope of his responsibilities" by making "inappropriate enquiries into Katherine Simms' settlement in a discussion with the auditor."

40 The discussion with auditor Schmidt occurred in a telephone conversation following the settlement that the Association made with Simms. Clark and St. Germain had questioned Schmidt as to whether it was proper to code the legal settlement with Simms as salary, which they had been told to do. Linn admitted that it was not improper for them to call the auditor regarding how to code something. She acknowledged that, since Clark paid the bills, he would have known the amount of the settlement but would "guess" that they were seeking "more 45 information regarding the settlement." She cited no basis for her "guess." Schmidt did not testify. Although Linn claimed that their conversation regarding the coding was "very inappropriate," she spoke with neither of them at the time. She did not inform St. Germain that the conversation was inappropriate until after she had cited it when discharging Clark.

The Association has two policies relating to employee use of equipment of the Association. The Information Technology provision at page 18 of the Association's Personnel Policy Manual permits employees to use software and business equipment for reasonable

personal purposes so long as they reimburse the Association for such use including specifically long distance calls and copies of documents. It cautions that such use is “at their own risk,” including specifically “loss of privacy.” In addition, the Association promulgated an Electronic Communications Policy that states that electronic communications are provided “as

5 communications tools for conducting Association business. No other use of Association electronic communications is authorized. In addition, the electronic communications tools provided by the TDA may not be used to solicit or proselytize for commercial ventures, religious or political causes, outside organizations, or other non-job-related solicitations.”

10 Executive Director Linn, in her testimony, did not harmonize the inherent contradictions between the Information Technology and Electronic Communications Policy. Documentary evidence, including multiple personal e-mails from and to various employees and supervisors at the Austin office, the forwarding of jokes, and solicitation for the sale of Girl Scout cookies, establishes that the official use only requirement of the Electronic Communications Policy was

15 not adhered to. Executive Director Linn acknowledged that prior to the discharge of Clark no employee had been disciplined for violation of that policy. Following my receipt of several documents demonstrating the absence of adherence to the new policy, Counsel for the Respondent stated that there was no question that “we [the Association] allow personal e-mails from the employees,” the practice permitted by the Information Technology provision of the

20 Personnel Policy Manual. Counsel further stated that the Association did not allow “employees to take the membership list and e-mail addresses of the members of the Association and use it for their personal business,” but Executive Director Linn admitted that the Association publishes a membership directory that can be purchased by members of the general public. Regarding e-mail addresses, Linn testified that if an employee had sent out an e-mail to the delegates selling Girl Scout cookies that “[t]hey would not have been fired,” that she would have “sat down and

25 talked to them and put something in their personnel file.”

On September 14, when responding to the claim of Clark for unemployment benefits, Linn stated that he was discharged for insubordination, violation of the Electronic

30 Communications Policy, and acting outside the scope of his responsibilities.

When testifying pursuant to Section 611(c) of the Federal Rules of Evidence, Linn confirmed to Counsel for the General Counsel that the foregoing three reasons were the basis for Clark’s discharge. When called by the Respondent, Linn agreed with Counsel for the

35 Respondent that part of the reason for Clark’s discharge was bringing “confidential personnel issues to the attention of people outside the board of directors.” The confidential personnel issues were not delineated. The petition reveals no confidential personnel issues. No individual, specifically Simms, is named. Insofar as the petition was not read, its concerns were not brought to the attention of people outside the Board of Directors. Clark sent the petition to the

40 Board of Directors, not the delegates.

In the prepared statement that Linn read to Clark when discharging him, she informed him that “one of the documents” had been found on the hard drive of his computer. Clark was not questioned nor given an opportunity to explain how this might have occurred. Although Linn

45 denied that she would have “fired someone” who came forward pursuant to her directive and asserted that she would have “listened to them and counseled them on how to appropriately go through the complaint process,” the foregoing denial and assertion were not given specifically with regard to Clark. Insofar as there be any contention that the foregoing testimony related to Clark, I do not credit it.

On August 17, Director Lockerman was also discharged. Linn, citing her conversations with Young and Blum, stated that it was evident that Lockerman “had information of events

leading up to the Annual Session petition and the anonymous e-mails and failed to discuss your knowledge with me. This is insubordination on two levels—as a manager and an employee.” Linn also cited Lockerman for “undermining my authority,” a reference to an event in 2005 regarding a paid time off policy. Lockerman had been counseled regarding that matter shortly after it had occurred. Linn also referred to “hosting employee grievances in your office.” This alleged dereliction that purportedly contributed to her discharge was the fact that Lockerman “always was willing to listen to people and their concerns.” Linn admitted that she discharged Lockerman “mainly for not coming to me ... as I requested” on May 17 regarding her knowledge relating to the petition submitted by the employees.

3. Analysis and Concluding Findings

a. The Discharge of Nathan Clark

Section 7 of the Act protects the right of employees “to engage in ... concerted activities for [their] ... mutual aid or protection, and Section 8(a)(1) of the Act prohibits employers from interfering, restraining, or coercing employees in the exercise of that right. The complaint alleges that Clark was discharged because he engaged in protected concerted activity. Employee activity is concerted when it is “engaged in with or on the authority of other employees,” and a respondent violates the Act if, having knowledge of an employee’s concerted activity, it takes adverse employment action that is “motivated by the employee’s protected concerted activity.” *Meyers Industries (Meyers I)*, 268 NLRB 493, 497 (1984). In this case, the communications that were submitted in the course of the employees’ concerted activity were anonymous, but anonymous submissions do not lose the protection of the Act. *Chrysler Credit Corp.*, 241 NLRB 1079 (1979). Although Dr. Baxley had been directed not to involve himself in personnel matters, he attempted to present the petition at the Annual Session, and Clark thereafter sent it to the Board of Directors. Employee communications to third parties are protected. *North Carolina License Plate Agency # 18*, 346 NLRB 293 (2006).

Employee Clark was discharged as soon as the Respondent had evidence of his involvement in the activities of the employees as established by the finding of a fragment of the petition on the hard drive of his computer.

The Respondent argues that the activities of the employees herein were not concerted because they related to the discharge of Simms, a supervisor, and that there is no evidence that Simms affected the terms and conditions of employment of Clark, St. Germain, or Kim, the three statutory employees who testified. I reject that contention. The petition does not mention Simms. Although the treatment of Simms was the issue upon which Dr. Baxley was focused, the record establishes, consistent with statement in the May 18 letter from St. Germain in which she identified herself as “[a] concerned TDA staff member,” the termination of Simms “was only one among many issues.” Although Kim was concerned about “fairness” with regard to Simms, Clark was concerned about fairness with regard to Hispanic employee Victor Sanchez, and St. Germain was concerned regarding the treatment of the former receptionist as expressed in her e-mail. Although arguing that the complaints regarding the condition of the building were “not the complaints of any employee but himself [Clark],” the Respondent neglects to note that the photographs of pooled water in the parking lot, GC Exhibit 36, were taken by St. Germain who described it as a “chronic problem ... since our maintenance man [Sanchez] had been fired.” Clark testified without contradiction that one employee was complaining about being requested to take certain hours off of her time card and another about alleged sexual harassment.

Contrary to the argument in the brief of the Respondent, the activity of the employees herein was not confined to the Simms situation. Although the Simms situation was the concern

of Dr. Baxley and employee Teresa Kim, Simms' termination was simply the catalyst for the protected concerted activity of the employees that encompassed multiple issues and concerns unrelated to Simms. Any contention to the contrary is refuted by the fact that the petition does not mention Simms. It refers to "poor management, negligence, and unfair treatment "

5 Allegations of unfair treatment constitute protected concerted activity. *Winston-Salem Journal*, 341 NLRB 124, 125 (2004). "The Act is concerned with concerted activity, not concerted thought. Any contention that a failure of all participants in a group activity to entertain identical reasons for engaging in that activity renders the activity individual rather than concerted is plainly without merit." *Advance Cleaning Service*, 274 NLRB 942, 945 fn. 3 (1985). The result of

10 the employee's activity was the protected concerted submission of the petition that complained of "poor management, negligence, and unfair treatment." The petition goes on to state that the employees seek "to voice our concerns to an impartial outside source free from any retaliation or repercussion" in order to have "a better, fairer, and more ethical place to work." The defeated resolution called for appointment of an impartial and outside source. Executive Director Linn

15 testified that she "understood it [the petition] to be some very disgruntled employees who have some issues but who are not being specific and who have not gone through the specific channels to express their concerns." The foregoing testimony establishes her belief that the petition related to "issues" and that it came from "disgruntled employees." A respondent's belief that protected activity has occurred is controlling. *Henning and Cheadle*, 212 NLRB 776, 777

20 (1974). The petition refers to unsuccessful attempts addressed to "current management through use of the 'proper channels.'" The attempt of the "disgruntled employees" to have their claims of unfairness and unresponsiveness by current management addressed impartially constituted protected concerted activity relating to their working conditions.

25 The Respondent, in its brief, argues that there is "no evidence that Clark was discharged because he engaged in protected concerted activity (which he was not), rather than for disobeying a direct order and attempting to obtain the details of a confidential settlement." There is no evidence that Clark attempted to obtain the details of a confidential settlement. He questioned the coding of the Simms settlement, the amount of which he was aware because of

30 his duties. Linn acknowledged that speaking with the auditor regarding coding was appropriate but that she would "guess" that Clark and St. Germain were seeking "more information regarding the settlement." She considered their conversation with auditor Schmidt regarding the coding to be "very inappropriate." There is no evidence that Clark sought "more information." If he had done so, Schmidt would have confirmed that fact. Schmidt did not testify. The fact that

35 Linn did not seek to speak with either Clark or St. Germain in late April or May, when she claims that she learned of their inquiry regarding coding, establishes that this inquiry by Clark was proper and that any contention that it was improper is a pretext.

40 Clark's disobedience of the direct order to report any involvement regarding "anonymous communications," i.e. the petition and e-mails, was protected concerted activity. The Respondent cites no precedent requiring employees to confess their involvement in protected activity when requested to do so. Coercive interrogations relating to employees' protected rights violate the Act. Indeed, employees are excused from failing to tell the truth when interrogated regarding their protected activities insofar as their responses constitute "a

45 continuation of ... [their] protected, concerted activities." *Earle Industries*, 315 NLRB 310, 315 (1994). The employees' concern about retaliation stated in the petition and several employees "making zipper motions across their mouth" on May 17 confirm that their failure to come forward was a continuation of their protected concerted activity. Clark failed to submit to a meeting on "an individual basis" regarding whether he "participated in anyway [sic] in these anonymous communications." By failing to respond, Clark effectively untruthfully informed the Respondent that he was not involved. After the examination of the hard drive of Clark's computer revealed fragments of the petition, he was not questioned regarding how that might have occurred

relative to authorized or unauthorized use of the computer. He was discharged for failure to respond to the directive relating to participation in “anonymous communications.” Respondent’s purpose in making that demand was “to determine who had been engaged in ... protected concerted activity,” the preparation of the petition and e-mails. *United Service Automobile Assn.*, 340 NLRB 784, 786 (2003). Employees are not required to divulge their involvement in protected activity. Clark’s failure to respond to the Respondent’s directive “did not constitute a lawful reason to discharge” him. *Ibid*; see also *Alamo Rent-A-Car*, 336 NLRB 1155 (2001).

An analysis pursuant to *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981). *cert. denied* 455 U.S. 989 (1982), is appropriate in cases that turn upon the respondent’s motivation, not in cases where there is no motivation issue. *Phoenix Transit System*, 337 NLRB 510 (2002). There is no motivation issue in this case. Clark was discharged when fragments of the petition were found on the hard drive of his computer. The fragments established that Clark failed to comply with the directive that any employee who “participated” in any way in the anonymous communications meet individually with Linn. The petition and communications sent by Clark anonymously constituted protected concerted activity, and he was not obligated to respond to the directive that he reveal his involvement. By discharging Clark for his protected concerted activity, the Respondent violated Section 8(a)(1) of the Act.

Even if this be viewed as a mixed motivation case, the General Counsel established that Clark engaged in protected concerted activity and that the Respondent had knowledge of that activity. The spontaneous remark of Dr. May that “they’ll be fired,” and the undenied conversation in which Director Haufler, Clark’s direct supervisor, asked Lockerman to talk him out “these activities, because ... he would be fired,” establish animus. Clark was told that he was discharged for “participating in the anonymous e-mail scheme and ignoring” the May 17 request of Linn to meet with her on an individual basis. The Respondent has not established that Clark would have been discharged in the absence of those reasons. He was also told that he had violated the Electronic Communications Policy and that he had acted “outside the scope of his responsibilities” regarding the Simms settlement. As already discussed, Clark’s inquiry regarding the coding of the settlement was proper, and this asserted reason that Linn did not mention to Clark until August was a pretext.

Prior to the discharge of Clark, no employee had been disciplined for an alleged violation of the Electronic Communications Policy. Linn told Clark that he had inappropriately used “the Association’s computer and e-mail system” in violation of that policy, but employees are permitted to send personal e-mails pursuant to the Information Technology provision in the Personnel Policy Manual. At the hearing, Linn agreed with Counsel for the Respondent that part of the reason for Clark’s discharge was bringing “confidential personnel issues to the attention of people outside the Board of Directors,” but the petition reveals no confidential personnel issues, and Clark sent the petition to the Board of Directors, not the delegates. There is no probative evidence that Clark’s use of the e-mail addresses of the Board of Directors would have resulted in discharge absent his protected concerted activity. Any doubt in that regard is erased by Linn’s admission that if an employee had sent out an e-mail to the delegates selling Girl Scout cookies “[t]hey would not have been fired.” The Respondent has not established that Clark would have been discharged in the absence of his protected concerted activities.

Following the decision by the Board in *Register Guard*, 351 NLRB No. 70 (2007), the complaint was amended to delete an allegation that the Electronic Communications Policy violated Section 8(a)(1) of the Act. The complaint now alleges disparate enforcement of the policy with regard to Clark. Insofar as Clark would not have been discharged absent his protected activity, the disparate enforcement of that policy is subsumed in my finding that the Respondent discharged Clark for engaging in protected concerted activity.

b. The Discharge of Barbara Jean Lockerman

The complaint alleges that Lockerman was discharged for refusal to engage in unfair labor practices. Lockerman was discharged because she “had knowledge of events leading up to the Annual Session petition and the anonymous e-mails and failed to discuss” her knowledge with Linn which was insubordination on two levels, “as a manager and an employee.” Linn also cited Lockerman for “undermining my authority,” a reference to an event in 2005 regarding a paid time off policy about which Lockerman had been counseled at the time and “hosting employee grievances in your office,” referring to the fact that Lockerman “always was willing to listen to people and their concerns.”

I reject any contention that that the incident regarding the paid time off policy in 2005, or “hosting grievances” played any part in the discharge determination. They are pretextual. Linn counseled Lockerman in 2005 when the incident occurred. Linn admitted that “hosting grievances” meant that Lockerman was “always was willing to listen to people and their concerns,” hardly a reason for termination.

I find that the sole reason for the discharge of Lockerman was her failure to come forward with her knowledge relating to the petition, the protected concerted activity of the employees, after Linn directed all employees and supervisors to do so on May 17.

Board precedent, consistent with the exclusion of supervisors from the protection of Act, interprets that exclusion strictly. In *Parker Robb Chevrolet*, 262 NLRB 402 (1982), the Board rejected prior cases that suggested that the discharge of a supervisor as an “integral part” of an employer’s antiunion campaign or as a “pattern of conduct” consistent with coercing employees in the exercise of their Section 7 rights violated the Act. The Board held that discrimination against a supervisor will be found to violate the Act only when the discriminatory action impinges directly upon employee Section 7 rights stating:

As noted above, the Board has found that, when a supervisor is discharged for testifying at a Board hearing or a contractual grievance proceeding, for refusing to commit unfair labor practices, or for failing to prevent unionization, the impact of the discharge itself on employees’ Section 7 rights, coupled with the need to ensure that even statutorily excluded individuals may not be coerced into violating the law or discouraged from participating in Board processes or grievance procedures, compels that they be protected despite the general statutory exclusion. In contrast, although we recognize that the discharge of a supervisor for engaging in union or concerted activity almost invariably has a secondary or incidental effect on employees, ... this incidental or secondary effect on the employees is insufficient to warrant an exception to the general statutory provision excluding supervisors from the protection of the Act. ... The discharge of supervisors is unlawful when it interferes with the right of employees to exercise their rights under Section 7 of the Act, as when they give testimony adverse to their employers’ interest or when they refuse to commit unfair labor practices. Id at 404 [footnotes omitted].

Although an employer may obtain knowledge of employees’ protected Section 7 activity as a result of information volunteered by those employees, an employer may not interfere with, restrain, or coerce employees in the exercise of their Section 7 rights by engaging in surveillance or coercively interrogating employees in order to obtain information regarding their protected activities. The employees herein feared retaliation. They sought to protect their anonymity, and they therefore submitted the petition anonymously.

The Respondent, in its brief, points out that Lockerman was not directed to engage in surveillance, but contends that "it would not have been unlawful for Lockerman to have voluntarily reported her innocently-acquired knowledge of the employees' activity; in fact, it would have been loyal to TDA's [the Association's] interest had she alerted Ms. Linn to the employee plans," and that she should have done so. The issue herein is not, however, what the Respondent believes that Lockerman should have done. The issue is whether the Respondent could require that she divulge the information that she obtained as a result of her voluntary attendance at a portion of the second meeting where she learned of the existence of the petition and the identities of the employees in attendance. Board precedent establishes that the Respondent was not entitled to that information and that Lockerman was entitled to withhold it.

In *Howard Johnson Motor Lodge*, 261 NLRB 866 (1982), the Board held that the discharge of a supervisor who had voluntarily attended a union meeting and thereafter refused to report upon the employees involved in that protected activity constituted refusal to commit an unfair labor practice and violated the Act. *Id.* at fn. 2. Although that case was decided prior to *Parker Robb Chevrolet*, the finding therein meets the criterion that a supervisory discharge violates the Act when the supervisor refuses "to commit unfair labor practices." I need not attempt to paraphrase the following applicable analysis stated by Administrative Law Judge Stanley Ohlbaum in *Howard Johnson Motor Lodge*:

... [C]ontending that it had the absolute right to require Paquin [the supervisor] to disclose the identities of other employees she had observed at the union meetings, Respondent's position is bottomed on her being a supervisor and therefore required to demonstrate total "loyalty" to her employer. While I agree that an employer has the right to total loyalty from its supervisors, ... I cannot agree that loyalty encompasses requiring a supervisor to engage or participate in violation of the Act, or *entitlement by the employer to share in the forbidden fruits of what would have been its own violation of the Act if directed by it.* The fact that Paquin had not attended the union meetings at the behest of her employer did not give her employer the right to insist upon information to which it was not entitled and which it would clearly have been unlawful for it to direct Paquin to obtain.... To sanction requiring a supervisor to divulge the identities of other employees observed by him at such a union meeting would directly interfere with, restrain, and coerce other employees in the exercise of their Section 7 rights, since it would thereby permit the employer to acquire confidential organizational information, concerning its employees' protected concerted activities, to which the employer is not entitled. Under the circumstances, I find that, by requiring Paquin to disclose the names as indicated and by discharging her because she declined to divulge them, Respondent violated Section 8(a)(1), ... of the Act, as alleged in the complaint. *Id.* at 871 [Emphasis added, footnotes omitted.]

Although counseled by Dr. May not to get involved, Lockerman attended a portion of the meeting at the restaurant but left before it concluded and engaged in no further activity with the employees involved. The only information she possessed shown on this record is information that she gained from her attendance at that meeting. The Respondent was not entitled to that information relating to protected concerted employee activity. If Lockerman been directed to obtain that information and discharged for a refusal to do so, her discharge for refusing to engage in that unlawful act would have violated the Act. Consistent with the holding in *Howard Johnson Motor Lodge*, I find that the Respondent, by discharging Lockerman for failing to divulge information relating to protected concerted activities, information that if she had been directed to obtain would have violated the Act, the Respondent violated the Act.

B. Case No. 16–CA–25840

1. Facts

5 The allegations in the complaint arising from this charge relate to events in 2007, over a year after the discharges of Clark and Lockerman and shortly before the scheduled October 15, 2007, hearing regarding those discharges. Counsel for the Association was unfamiliar with the requirements of *Johnnie’s Poultry Co.*, 146 NLRB 770 (1964), that employees be given assurances against reprisals and voluntarily consent to being questioned in connection with trial
10 preparation. Critical to my findings are the fact that no interview ever took place and that counsel was fully aware of his obligations once other counsel became involved.

 In late September 2007, Executive Director Linn “in a very casual tone” informed employee Patricia St. Germain and Director Laura Haufler that she wanted them to “to go talk
15 to their [the Association’s] legal counsel” with regard to the upcoming hearing. On October 2, 2007, counsel for the Association called St. Germain and asked her to come to his office that afternoon. St. Germain replied that she could not “comply right now, because I want to seek my own legal counsel.” Counsel repeated his desire that St. Germain come that afternoon, and St. Germain responded that she would prefer to make any statement to the personnel committee of
20 the Board of Directors. St. Germain became upset with counsel who repeated that he “wanted to hear what she had to say.” The conversation ended with counsel telling St. Germain to have the attorney she was going to seek to “call me by tomorrow.”

 St. Germain spoke with an attorney who, consistent with *Johnnie’s Poultry Co.*, supra,
25 informed her that, prior to any questioning by the Respondent’s counsel, she must be given assurances against retaliation and that she had the right to refuse to cooperate.

 At 12:15 p.m. on October 3, 2007, Linn sent St. Germain an e-mail directing her to contact counsel for the Association. At 1:21 p.m., St. Germain replied by e-mail stating that she
30 would “not be able to comply,” that she had consulted an attorney and been informed that she was entitled to assurances against retaliation and, even if given assurances, that she could not be “required to talk to TDA legal counsel or to anyone at TDA” regarding the upcoming hearing. At 4:23 p.m., an e-mail sent “on behalf of” Association’s counsel to St. Germain states that he
35 “knows of no procedure like the one you refer to,” but he makes no demand that she speak with him. It requests that St. Germain have her attorney contact counsel for the Association or provide her attorney’s name and telephone so that counsel for the Association could contact her attorney.

 There were no further communications. On October 4, 2007, St. Germain filed the
40 charge in Case No. 16–CA–25840, and the hearing on October 15, 2007, was postponed.

2. Analysis and Concluding Findings

 The complaint herein alleges in paragraph 21 that Linn, in late September 2007,
45 directed and/or demanded that an employee submit to questioning by Respondent’s attorneys regarding the concerted activities of the employees relating to the upcoming hearing. Paragraph 22 alleges that, on October 2, 2007, the Respondent’s attorney directed and/or demanded that an employee submit to questioning and interrogated the employee. Paragraph 23 alleges that, on October 3, 2007, Linn directed and/or demanded that an employee submit to questioning by Respondent’s attorneys and “threatened and/or impliedly threatened the employment of an employee if the employee did not submit to questioning by Respondent’s attorneys.” Paragraph 24 alleges that, on October 3, 2007, the Respondent’s attorney directed

and/or demanded that an employee submit to questioning and “threatened and/or impliedly threatened the employment of an employee if the employee did not submit to questioning.”

It is undisputed that no meeting or interrogation took place. Although counsel for the Association, on October 2, 2007, asked St. Germain to come to his office and, after she refused, repeated his desire to speak with her, that he “wanted to hear what she had to say,” the conversation ended with the request that St. Germain have the legal counsel that she had stated she wanted to seek to call him. The October 3, 2007, e-mail sent “on behalf of” counsel makes no demand that St. Germain speak with counsel regarding the upcoming unfair labor practice hearing and contains no threat. It requests that St. Germain have her attorney contact counsel or that St. Germain advise counsel of her attorney’s name and number so that counsel could contact her attorney.

The Respondent citing *Auto Glass & Upholstery Co.*, 264, NLRB 149, 153 (1982), argues that there can be no violation of the Act because the obligation to give assurances pursuant to *Johnnie’s Poultry* arises at the point that the interrogation is to commence.

The General Counsel argues that the holding in that case is not dispositive in view of the finding in *Palagonia Bakery Co.*, 339 NLRB 515 (2003), that assurances given at the point of the interview by the respondent’s attorney were insufficient insofar as the employees had been told by the respondent’s president that they had to testify without any qualifications or assurances and that he then brought them into the office to meet with the attorney. In those circumstances, the administrative law judge found that the employees “could not have felt free ... or that ... their participation was voluntary.” *Id.* at 527.

No party has cited a case, and I have found no case, in which a violation has been predicated upon an interrogation that never took place. Although no assurances were given when Linn informed St. Germain that she wanted her to “go talk” to the Association’s counsel, there was no demand that she testify. When counsel called her, St. Germain refused to meet. On October 3, 2007, having learned of St. Germain’s refusal, Linn directed her “to meet ... to assist the firm in representation” of the Association. No threat was made. St. Germain did not comply. No action was taken against her. The only demand made thereafter was the request of counsel that St. Germain’s attorney be in contact with him.

In *Wire Products Mfg. Corp.*, 326 NLRB 625, 628 (1998), the respondent was found to have violated the Act when employees who submitted to an interview were asked questions that “pried into other union matters” which were not the subject of the unfair labor practice proceeding. No violation was found “notwithstanding the fact that they were directed to go to the interview room before any assurances were given” because, at the interview, “if an employee declined to execute the waiver and voluntarily submit to questioning, the meeting was promptly terminated.” *Id.* at 644.

St. Germain insisted upon her rights. The Respondent took no action against her. Counsel, although ignorant of those rights, did not attempt to interview her. He requested that St. Germain have the attorney with whom she had consulted contact him.

I shall recommend that paragraphs 21 through 24 of the complaint be dismissed.

Conclusions of Law

1. By discharging Nathan Clark because he engaged in protected concerted activities, the Respondent has engaged in unfair labor practices affecting commerce within the meaning

of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By discharging Barbara Jean Lockerman because she refused to engage in an unfair labor practice, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having unlawfully discharged Nathan Clark and Barbara Lockerman, it must offer them reinstatement and must make them whole for any loss of earnings and other benefits. Backpay shall be computed on a quarterly basis from August 17, 2006, to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). In view of the decision in *National Fabco Mfg.*, 352 NLRB No. 37 at fn. 4, (2008), I need not address the request of the General Counsel regarding compound interest.

The Respondent will also be ordered to post an appropriate notice. I deny the request for an electronic posting. Electronic communications are subject to immediate deletion. The formality of the 60 day posting of a Board notice will appropriately inform the employees of their rights and of the remedial actions that the Respondent has been ordered to take.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²

ORDER

The Respondent, Texas Dental Association, Austin, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Discharging employees for engaging in protected concerted activities.

(b) Discharging supervisors for refusing to engage in unfair labor practices.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days from the date of this Order, offer Nathan Clark and Barbara Jean Lockerman full reinstatement to their former jobs or, if those jobs no longer exist, to

² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Nathan Clark and Barbara Jean Lockerman whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of Nathan Clark and Barbara Jean Lockerman and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Austin, Texas, copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 17, 2006.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. April 12, 2008

George Carson II
Administrative Law Judge

³ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board had found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT discharge any of you for engaging in protected concerted activities.

WE WILL NOT discharge any supervisor for refusing to engage in unfair labor practices.

WE WILL, within 14 days of the Board's Order, offer Nathan Clark and Barbara Jean Lockerman full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Nathan Clark and Barbara Jean Lockerman whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges, and within 3 days thereafter notify Nathan Clark and Barbara Jean Lockerman in writing that this has been done and that the discharges will not be used against them in any way.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

TEXAS DENTAL ASSOCIATION

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

819 Taylor Street, Fort Worth TX 76102-6178
(817) 978–2921, Hours: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (817) 978–0678

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